Supreme Court, U.S.
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No. 05-252

In The Supreme Court of the United States

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 494,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

Matthew R. Robbins
Nathan D. Eisenberg
Counsel of Record
PREVIANT, GOLDBERG, UELMEN, GRATZ, MILLER & BRUEGGEMAN, S.C.
1555 North RiverCenter Drive
Suite 202
Post Office Box 12993
Milwaukee, Wisconsin 53212
(414) 271-4500

Counsel for Petitioner

THE LEX GROUP DC • 1750 K Street N.W. • Suite 475 • Washington, DC 20006
(202) 955-0001 • (800) 815-3791 • Fax: (202) 955-0022 • www.thelexgroupdc.com

QUESTIONS PRESENTED FOR REVIEW

Did the National Labor Relations Board exceed its statutory authority where it held that a union violates the National Labor Relations Act by disciplining a member who works for an employer with whom the union had no collective bargaining relationship?

LIST OF PARTIES TO PROCEEDING

International Brotherhood of Electrical Workers, Local 494

National Labor Relations Board

Joseph G. Podewils

Gerald Nell, Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. R. 29(6), Petitioner International Brotherhood of Electrical Workers, Local 494, states that it is a voluntary unincorporated association, without any parent corporation or publically held stock, and is a "labor organization" within the meaning of the National Labor Relations Act.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES TO PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING PETITION 4

CONCLUSION 10

APPENDIX

TABLE OF AUTHORITIES

PAGE(S)

CASES

American Broadcast Cos. v, Writer's Guild, West,
437 U.S.411 (1978) 7

Florida Power & Light v. Int'l Bhd of Electrical Workers, Local 641,
417 U.S. 790 (1974) ..... *passim*

Int'l Bhd of Electrical Workers, Local 494,
332 NLRB 1223 (2000) 1, 2, 9

Int'l Bhd of Electrical Workers, Local 494,
341 NLRB No. 71 (2004) 1, 3

Int'l Bhd of Electrical Workers, Local 494 *v. National Labor Relations Board,*
2005 U.S. App. LEXIS 9770
(D.C. Cir May 24, 2005) 1

N.L.R.B. v. Int'l Bhd of Electrical Workers, Local 1547,
971 F.2d 1435 (9th Cir. 1992) 9

NLRB v. Allis Chalmers Mfg.,
388 U.S. 175 (1967) 4

NLRB v. Boeing,
412 U.S. 67 (1970) 4

NLRB v. Int'l Bhd of Electrical Workers, Local 340,
481 U.S. 573 (1987) ..... *passim*

Podewils v. National Labor Relations Board,
274 F.3d 536 (D.C. Cir. 2001) 1, 3

San Francisco-Oakland Mailers' Union No. 18 (Northwest Publications, Inc.),
172 NLRB 2173 (1968) 5, 6

STATUTES

28 U.S.C. § 1254(1) 1

29 U.S.C. §158(b)(1)(A) 2

29 U.S.C. § 158(b) 1

29 U.S.C. §158(b)(1)(B) ..... *passim*

RULE

Sup. Ct. R. 29(6) ii

OPINIONS BELOW

The opinion of the court of appeals is an unpublished decision available at 2005 U.S. App. LEXIS 9770 (D.C. Cir. May 24, 2005). The decision and order of the National Labor Relations Board are reported at 341 N.L.R.B. No. 71 (2004). An earlier appeal to the court of appeals is reported at 274 F.3d 536 (D.C. Cir. 2001), based on an initial decision of the Board reported at 332 N.L.R.B. 1223 (2000).

JURISDICTION

The judgment of the court of appeals was entered on May 24, 2005. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 8(b) of the National Labor Relations Act, 29 U.S.C. § 158(b), provides:

It shall be an unfair labor practice for a labor organization or its agents...

(1) to restrain or coerce * * * (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances[.]

STATEMENT OF THE CASE

On March 31, 2004, the National Labor Relations Board issued a decision finding that Local 494 of the International Brotherhood of Electrical Workers ("Local 494") violated §8(b)(1)(B) of the National Labor Relations Act where it disciplined its member, Joseph Podewils, for working for a non-union contractor, Gerald Nell, Inc. ("Nell"). *Int'l Bhd of Electrical Workers*, Local 494, 341 NLRB No. 71 (2004). Local 494 has no collective bargaining

agreement with Nell or any bargaining relationship with the company. Section 8(b)(1)(B) of the Act prohibits coercion of an employee in the selection of representatives for the purposes of "collective bargaining" or the "adjustment of grievances." 29 U.S.C. §158(b)(1)(B).

In October 1997, Nell, a nonunion electrical contractor, hired Podewils as its electrical division manager. *Int'l Bhd of Electrical Workers, Local 494*, 332 NLRB 1223 (2000). On December 1, Local 494 business representative, Leon Burzynski, went to the offices of Nell. *Id.* During a brief conversation with Podewils, Burzynski asked "what would be the opportunity of [Podewils] working to organize the company." Podewils replied, "that wouldn't happen here . . . that wouldn't be an option." *Id.* Burzynski then gave Podewils his business card with his home telephone number written on the back, but, made no further contact with Podewils. *Id.* Thereafter, Local 494 made no effort to circulate authorization cards to any employees of Nell; it did not engage in any picketing or handbilling of Nell; nor did it make any efforts of any kind to establish a collective bargaining relationship with Nell. *Id.* On December 15, Burzynski filed internal union charges alleging that Podewils was working for a nonunion company, contrary to the obligations of Local 494 members under the union's constitution. *Id.*

Nell filed a charge against the Union with the National Labor Relations Board ("Board") on May 27, 1998, alleging a violation of §§8(b)(1)(A) and 8(b)(1)(B) of the National Labor Relations Act. In an initial decision, dated October 31, 2000, the Board held that Local 494 did not violate §8(b)(1)(B) of the Act and it was not seeking to represent the employees of Nell. *Int'l Bhd of Electrical Workers, Local 494*, 332 NLRB 1223 (2000).

On December 28, 2001, the U.S. Court of Appeals for the District of Columbia reversed the Board's decision, overruling the Board's conclusion that Local 494 was not seeking a collective bargaining relationship with Nell when it processed the internal charge against Podewils. *Podewils v. National Labor Relations Board,* 274 F.3d 536 (D.C. Cir. 2001). The court noted that the Board had "assumed that Podewils qualified as a grievance adjuster" in its decision. *Id.* at 540.

On March 31, 2004, the Board issued a supplemental decision and held that the Union violated §8(b)(1)(B) because it was seeking a collective bargaining relationship with the employer. *Int'l Bhd of Electrical Workers, Local 494,* 341 NLRB No. 71 (2004). The Board acknowledged Justice Scalia's concurring opinion in *NLRB v. Int'l Bhd of Electrical Workers, Local 340 (Royal Electric),* 481 U.S. 573, 597 (1987) (Scalia, J. concurring) where he stated that Section 8(b)(1)(B) should be limited "to circumstances where there is an actual contract between the Union and affected employer, without regard to whether the union has an intent to establish such a contract." The Board, however, made no determination of whether there can be a violation of § 8(b)(1)(B) where no collective bargaining relationship exists. The Board stated only that Justice Scalia's concurrence in *Royal Electric* "does not reflect the state of current Board law." [1]

On May 24, 2005, the court of appeals denied a second petition for review. The court made no new finding concerning whether §8(b)(1)(B) could be violated where there is no collective bargaining relationship. The court stated that it had already endorsed the Board's reading of the statute in Nell's previous appeal.

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[1]Board Member Liebman believed that while the question of whether § 8(b)(1)(B) applies to unorganized settings was worthy of consideration, the Board was bound by the law of the case on remand.

REASONS FOR GRANTING PETITION

It has long been understood that the relationship between a member and his union is contractual in nature. *NLRB v. Boeing*, 412 U.S. 67, 75-76 (1970). Provisions for fines were common elements in union constitutions at the time of the enactment of §8(b)(1)(B), and court enforcement of union fines was known as early as 1867. *NLRB v. Allis Chalmers Mfg.*, 388 U.S. 175, 181-182, n.9 (1967). Virtually all union constitutions prohibit members from working for non-union employers. Thus, the decision is this case affects the relationship between unions and union members across industries. Moreover, although the Board's decision is inconsistent with this Court's reasoning in *NLRB v. Int'l Bhd of Electrical Workers, Local 340 (Royal Electric)*, 481 U.S. 573 (1987), the special issue of whether §8(b)(1)(B) is applicable to discipline of supervisor-members where there is no collective bargaining relationship was explicitly left open by the Court in that decision. Resolution of this issue is important to unions, union members and employers across industries and throughout the United States.

The National Labor Relation Board exceeded its statutory authority when it determined that §8(b)(1)(B) of the National Labor Relations Act may be violated where the employer has no collective bargaining relationship with the union. Twice before, in *Florida Power & Light v. Int'l Bhd of Electrical Workers, Local 641 (Florida Power)*, 417 U.S. 790 (1974) and *Royal Electric*, this Court has overruled the Board where it promulgated "a general prohibition of a union's discipline of supervisor-members." *Florida Power* at 802. In this case, the Board has again interpreted §8(b)(1)(B) expansively, such that any discipline of a supervisor member violates the Act so long as the union is "seeking" a collective bargaining relationship with the supervisor's employer. Because the structure of the NLRA does not

permit such an outcome, the Board's ruling raises an important federal question.

By its terms §8(b)(1)(B) was not designed to prevent labor unions from disciplining supervisor-members, but only to prevent "restrain[t] or coerc[ion]" of employers in selecting collective bargaining or grievance adjustment representatives. In *NLRB v. Int'l Bhd of Electrical Workers, Local 340 (Royal Electric)*, 481 U.S. 573, 591 (1987), this Court held that §8(b)(1)(B) "was not intended to prevent enforcement of uniform rules that may occasionally have the incidental effect of making a supervisory position less desirable:"

> [B]oth the structure of the NLRA and recent developments in its interpretation suggest that employers are no longer restrained or coerced in their selection of representatives by union discipline of supervisor members. The statute itself reveals that it is the employer, not the supervisor member, who is protected from coercion by the statutory scheme. It is difficult to maintain that an employer is restrained or coerced because a union member must accept union expulsion or other discipline to continue in a supervisory position.

Id. at 594. Thus, not every union rule that affects a union member's willingness to serve as a supervisor could be prohibited by a provision as narrow in scope as §8(b)(1)(B). *Id.* at 593.

Despite such strictures, the National Labor Relations Board has repeatedly attempted to interpret §8(b)(1)(B) broadly to prohibit all union discipline of supervisor members. Since the Board's decision in *San Francisco-*

Oakland Mailers' Union No. 18 (Northwest Publications, Inc., 172 NLRB 2173 (1968) (*Oakland Mailers*), the Board has repeatedly tried to assert a theory of "indirect coercion" of employers in their selection of §8(b)(1)(B) representatives.

Although *Oakland Mailers* may represent the "outer limit" of the Board's authority, it exceeds that limit where it interprets §8(b)(1)(B) as "a general prohibition of a union's disciplining supervisor members for their conduct in the course of representing the interests of their employers." *Florida Power & Light v. Int'l Bhd of Electrical Workers, Local 641*, 417 U.S. 790, 802 (hereafter *Florida Power*) (1974). In *Florida Power*, this Court rejected the Board's expansive theory of indirect coercion, finding that there could be no violation of §8(b)(1)(B) where a union disciplined supervisor members who were not performing collective-bargaining or grievance adjusting duties. *Id.* at 802-803, 805. The Court held that the Board improperly extended §8(b)(1)(B) to proscribe conduct which affected the manner in which members performed supervisory functions apart from collective-bargaining and grievance-adjusting

> By its terms, the statute proscribes only union restraint or coercion of an employer "in the ***selection*** of his representatives for the purposes of collective bargaining or the adjustment of grievances," and the legislative history makes clear that in enacting the provision Congress was ***exclusively*** concerned with union attempts to dictate to employers who would represent them in collective bargaining and grievance adjustment.

Id. at 803 (Emphasis added).